COMMITTEE ON RULES OF PROCEDURE
IN DOMESTIC RELATIONS CASES
Friday, July 9, 2004 10:00 am – 3:00 pm
Arizona Courts Building
1501 W. Washington, Conference Room 345
Teleconference #: (602) 542-9006
Web Site: http://www.supreme.state.az.us/drrc/

Members Present:
Hon. Mark Armstrong
Hon. Norm Davis
Annette Everlove, Esq.
Bridget Humphrey, Esq.
Phil Knox, Esq.
Hon. Dale Nielson
Richard Scholz, Esq.
Debra Tanner, Esq.
Hon. Nanette Warner
Dr. Brian Yee

Members Not Present:
Annette Burns, Esq.
Deborah Fine, Esq.
Janet Metcalf, Esq.
Hon. John Nelson

Staff Present
Konnie Young
Karen Kretschman
Elizabeth Portillo

Members Represented by Proxy:
Carol Schreiber for Hon. Michael Jeanes
Valerie Sheedy for Robert Schwartz, Esq.

Quorum:
Yes

Guest
Craig Reinmuth, CPA

1. Call to Order: Hon. Mark Armstrong

After welcoming Committee members, introductions, and determination of a quorum, Judge Armstrong reviewed the new materials contained in the meeting packet:

- Membership List
- Workgroup Lists
- Workgroup contact information
- ABA "Standards of Practice for Lawyers Representing Children in Child Custody Cases"
- Forms Workgroup sheet
- Memorandum from Bridget Humphrey regarding Rule 50 Temporary Orders
- Current Master Draft of the Rules
- Submissions since the last meeting
- Minutes from June 4, 2004: Judge Armstrong asked for a motion to approve the minutes at this time.

Motion: Minutes Approved.
Seconded
Vote: Minutes Approved.

2. Representation of Children Rule

The Committee reviewed the following components of the Representation of Children Rule proposed by Judge Karen Adam:

- The court may appoint an attorney to represent the child in a family law case pursuant to A.R.S. § 25-321.
- The court shall specify whether the attorney will serve as the child's attorney or as best interests attorney.
- The child's attorney shall provide independent legal counsel for the child.
- The best interests attorney shall provide independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.
- A lawyer appointed as a child's attorney or a best interests attorney shall not play any other role in the case and shall not testify. (There was a suggestion to delete the rest: "file a report or make recommendations.").

Judge Warner remarked that the Committee needed to look at Rule 38(b) because Rule 8 was formally Civil Procedure 17(g) and so was 38(b), and therefore would need to make sure that those are the same. She said that if what is on page 11 of the draft (Rule 8) is acceptable, that needs to also be replaced in 38(b) (page 42 of draft).

Judge Armstrong noted that this rule adopts the ABA standards for representation of children in child custody cases, and provides that there are two capacities in which lawyers act in these cases: 1) as a child's attorney, and 2) as a best interests attorney. It would do away with the term, *guardian ad litem* (GAL). He thought that perhaps there should be a reference to *guardians ad litem,* at least in the Comments, if this is the direction the Committee chooses to take, indicating that the *best interests attorney* closely approximates what used to be *guardian ad litem*. Judge Armstrong said that in order to understand this rule, the Committee would need to take a closer look at the ABA standards because they are specific and list examples. It also clarifies that the court shall not appoint a *guardian ad litem* to act on behalf of the minor or incompetent child, which some judges have done. This is not an appropriate role unless it comes out of Probate Court.

Discussion ensued regarding truncating paragraph 5. It was suggested to leave it silent, so that we can allow advocacy if we are going to appoint them as a lawyer. This is the position of the ABA. Bridget said if we allow them to do a report, we have got to allow the *guardians ad litem* to cross-examine the child's attorney or the best interests attorney.

The question was raised as to how we get information if the attorney on the scene cannot testify. Judge Armstrong said that he may refer to the GAL report, but he does not allow the GAL to testify.

Bridget Humphrey suggested there may be some benefit to having some discretion in a serious dispute issue regarding the attorney making recommendations. Judge Davis said it is important to have the attorney's role clarified. He said he was troubled by the fact that the attorneys put all the time and effort into this, and the court cannot hear from them.

Judge Armstrong noted that some of the distinctions that are drawn are really fine. He said he does not allow *guardians ad litem* to testify, but they may refer to their reports. He said he did not think that there was a difference between lawyers making recommendations and filing trial memoranda or being advocates.

Judge Armstrong summarized the following:

- Leave Rule 11 where it is;
- Make change to Paragraph 5 that Judge Armstrong suggested (leave it silent);
- Eliminate old version, which is the Committee's *guardian ad litem* rule, and
- Eliminate Rules 38 (b)(c) and (d).

Judge Armstrong asked the members to take a closer look at the ABA standards, and the topic will be reopened at the August meeting.

Bridget suggested that there needed to be some training for these people, because there is the danger that untrained people will not be gathering information appropriately. Dr. Yee stated that there are people who have years of psychological or psychiatric training who do evaluations that miss the mark.

There was more discussion. Judge Armstrong suggested the members take a straw vote. Judge Armstrong asked how many members feel the prohibition against filing the report and making recommendations should be left in. The majority agreed to leave in what was already there, but include the suggestion to delete the rest. Judge Davis suggested adding "shall not testify," and Judge Armstrong agreed.

Debra Tanner asked if something could be included to say the court will appoint the minor's parents as their representative or guardian for a paternity or child support matter. Judge Armstrong asked Debra to prepare a statement that can be included. Discussion ensued.

TASK: Debra will work on a statement regarding appointing minors' parents as their representative or guardian for a paternity or child support matter.

3. Reports from Workgroups:

a. Workgroup 5: Disclosure and Discovery (Judge Nelson, Chair)

There was discussion about the simplified version of Discovery and Disclosure which Judge Davis had prepared and the draft Valerie Sheedy had worked on with Robert Schwartz for more complex cases.

The question of whether interrogatories were part of Disclosure and Discovery arose, and Judge Armstrong said that the Disclosure and Discovery Workgroup needs to look at all aspects of disclosure and discovery, including depositions, interrogatories, etc. Valerie said that we need to know what kind of disclosure we require from people, beyond production of documents. She stated that she was concerned about getting too far away from disclosing underlying reasons for the claim, and ending up surprised a week or two before trial. Judge Davis agreed. Judge Armstrong said that simple is better.

TASK: Judge Davis and Valerie Sheedy will be added to this workgroup, and Konnie will assist Valerie in setting up a meeting time and place.

4. Break for lunch

5. Reports from Workgroups (Continued)

a. Workgroup 6: Alternative Dispute Resolution (Judge Warner, Chair)

Judge Warner reviewed her workgroup's update on this section. She said this was her workgroup's first attempt to present to the members an ADR rule. She said that Jim McDougall was the primary drafter of this rule.

The first section is "Alternative Dispute Resolution: Purpose, Definitions, Initiation and Duty; the second section is Private Mediation and Other Settlement Issues Outside the Conciliation Court; the third section is Conciliation Court, and the fourth section is Special Masters. There is also a section for miscellaneous areas.

Judge Warner asked the members to give input for a new title. Two titles have been considered: "Settlement and Non-Trial Resolution" and "Settlement Alternative Dispute Resolution." Judge Warner suggested that everyone understands "Alternative Dispute Resolution." However, there was a lack of consensus in the workgroup for either of these titles, and the workgroup agreed to present it to the Committee members to work out the title.

Discussion ensued regarding whether or not to keep Rule 2(D)(2) regarding a Settlement Conference Memorandum. The members agreed that the statement should remain as written. Judge Warner said there will be a separate rule under "Sanctions," because the workgroup found they were using "sanctions" in each section.

Regarding mediation, Judge Warner said that it was the consensus of the mediators involved that mediation needs to remain voluntary, and that mediation by definition is voluntary.

Bridget asked if the decision to make the mediation statement mandatory was a conscious decision, or one that should be left to the mediator. Judge Warner said that the mediators felt they wanted a statement because that was their practice. Bridget then asked if it had been discussed when mediation would not be appropriate, for instance, in domestic violence cases. Dr. Yee stated that there are guidelines under ACR and AFCC that say it is the mediator's responsibility to insure that it is an appropriate case for mediation, and that they consider issues such as domestic violence.

The question was asked if the qualifications of a mediator are discussed in this Rule. Dr. Yee replied only in the Conciliation Court section of this draft, which talks about a court-based roster, but it does not address regulating the private mediators. He also stated that disputants can choose whomever they desire to be an intermediary. He said this is a problematic issue, and mediators are working to do something themselves about this question.

Judge Armstrong stated the Maricopa County's court roster does include specific requirements and safeguards; anyone appointed from the list will meet those requirements. However, it is the party's right to choose whom they may and he did not think that the court could be involved in the party's choice of mediator.

In regard to Rule 2(A), Confidentiality, Judge Armstrong stated that would change the existing practice in Maricopa County by equating mediation with settlement conference for purposes of application of the mediation statute, A.R.S. §12-2238. He stated that the Maricopa County process does involve a written report to the courts, and this new rule forbids any written report or statement. Judge Warner said perhaps "settlement conferences" should be taken out of this section.

Dr. Yee said that Jim McDougall believes this is the most important point, and he believes in piggybacking the mediation statute to protect the settlement conference. He stated that when this was proposed by Jim, no one had considered the unintended consequence of not being able to provide a written report. He said that the workgroup would need to do additional work on this section. Judge Armstrong stated that we need to be very specific on what is allowed and what is not allowed. He said that at a minimum we want to allow for an innocuous report and also consideration for purposes of attorney's fees at the end of a case.

Judge Warner suggested that she rework "shall not file a written report or statement with the court" and qualify that, and also do a provision on attorney's fees. She agreed with Judge Armstrong that A.R.S. §12-2238 does not apply to settlement conferences, and did not think we could make it apply without the legislature deciding that they do. After discussion, Judge Armstrong asked Judge Warner to rework it, and Judge Warner agreed.

TASK: Judge Warner will rework the statement, "shall not file a written report or statement with the court" and also do a provision on attorney's fees.

Judge Armstrong asked Bridget to take a look at this on the issue she raised on mediation and domestic violence, and possibly come up with a proposal that would be reasonable. He thinks it should be addressed more specifically than is done in this Rule now.

TASK: Bridget will look at Rule 2(A) and work on a proposal that would be reasonable regarding the issue she raised on mediation and domestic violence.

In regard to Rule 2(D), Settlement Conference, Judge Warner stated that the Civil Rules allow for settlement conferences to have an *ex parte* contact with the judge, and that this should be included in this section, so that the judicial officer conducting the settlement conference does not have an ethical problem. Judge Armstrong agreed that she should add this.

TASK: Judge Warner will include in Section 2(D) a portion that allows for settlement conferences to have an *ex parte* contact with the Judicial Officer.

Judge Warner also stated that she would rework Section 2(D)(3) regarding the agreements of the reports of the court. She asked the members what their consensus was regarding the reports. Valerie said she has never seen these reports and that she assumed they go back to the court. Judge Armstrong agreed that this was the policy, but he changed this policy six months ago**.** He said he had just recently found out that the reports did not go to the parties, which is why he changed the policy. It was suggested that position statements in contested issues be given to the court in a sealed envelope by a judge pro tem, to be opened by the judicial officer at the time of the settlement conference.

Judge Warner continued reviewing Rule 3. Discussion ensued regarding the use of Conciliation "Court" or Conciliation "Services." Judge Warner said she would change "Court" to "Services" under the mediation section.

Regarding Rule 3 (B)(4), the question was asked if there was any discussion by the workgroup regarding a waiting period from the time the report goes out in order for counsel to view it and dispute it, if necessary. Judge Warner stated there was no discussion; however in Pima County the policy is that counsel has 30 days to file objections. If they do not file objections within 30 days, the report is submitted to the court for review for acceptance. Judge Warner said that it is important for a waiting period to be in the rule, and would add it under "Report to the Court: Agreements."

Judge Armstrong asked to go back and review Rule 3, (A)(2)(C). He stated that this rule is more specific than A.R.S. §25-381.17. By including A.R.S. § 25-315, temporary child custody and parenting time orders are excluded. Judge Warner agreed to remove that statute.

Judge Armstrong also asked if in Rule 3 (B), the paragraph after (4) "Special Master" be changed to (5) "Other ADR." Judge Warner stated that this was her original intention, and agreed to make the change

In regard to Rule 6, (A) (4), Dr. Yee suggested that "Family Court Master" would fit better in Rule 4, "Special Masters," and keep "Family Court Advisor" in Rule 6, "Other Court Services." The members agreed.

There was a question raised as to how many days should be allowed for a decree or an order to be filed and entered of record in Rule 8 (B). Judge Warner said that in Pima County, it is 60 days, and Judge Armstrong said that in Maricopa County, it is 30 days. It was suggested that 45 days be used as a compromise

Discussion ensued as to where Rule 9, "Voluntary Dismissal," should be located. Judge Armstrong said that he felt it belonged with Consent Decrees and Defaults, because it is not truly an ADR subject.

b. Workgroup 11: Family Law Forms (Bridget Humphrey, Chair)

Bridget reported that her workgroup had just held their initial meeting, and the list of forms included in the packet had been compiled by Konnie, and were the forms that had been completed, or the forms that had been referenced in the rules so far. She asked that the workgroups check the list and make sure there is nothing missing.

Bridget said that the workgroup does not want to repeat what the Supreme Court Forms Committee is doing, or what the various Clerks of the Court or self service centers have done. She said they would probably be providing forms that are mandatory, true standard forms, and possibly some of the new forms, such as a resolution statement, or a mediation statement or proposal, etc.

Judge Armstrong stated that we need to do a limited number of forms which will be published in West. He said the most important forms would be those used by *pro se* litigants. It was suggested that these rules reference and index the Supreme Court forms that are available on line and at the service centers. Discussion ensued about types of forms needed.

c. Workgroup 4: Emergency and Temporary Orders (Judge Davis, Chair)

Annette spoke about the discussion at the last Committee meeting regarding whether the court could retroactively modify temporary orders as they pertain to support, if they were made under simplified procedures. She said that she looked up the applicable statutes, and saw no prohibition on modifying a temporary order. She drafted a rule that gave the judge the discretion to modify it retroactively, and then the discretion to apply that modification as he or she saw fit prospectively.

The workgroup concluded that if this is not allowed, people will not be as willing to let the simplified procedure go forward, because they do not feel they can get adjustments that should have been made earlier. Debra Tanner said there was strong dissention about this from the Attorney General's Office.

Debra said she would take this draft back to her group at the Attorney General's Office to review it, and perhaps request to have someone from DES speak to the members at the next meeting. She said she would like to reserve any other comments until the next meeting.

Bridget referred to the 7/8/04 memorandum which she wrote regarding Rule 50 Temporary Orders. She said there already is a rule on temporary orders expiring if they are not specifically preserved in the decree. Her workgroup made some minor changes:

- Section m – a heading was added to make it consistent with the other subsections; and
- Section n – a paragraph was added regarding Temporary Orders being signed by the court and filed by the clerk. They will be enforceable as final orders during the pendancy of the action. However, the Temporary Orders become ineffective and unenforceable upon termination of an action either by dismissal or following entry of a final decree, judgment of order, unless that final decree, judgment or order provides otherwise. Orders of Protection, Workplace Orders of Protection and Injunctions Against Harassment are not subject to the provisions of this rule.

One member advised the group that the Supreme Court does not want anything done by Administrative Orders in terms of other procedures, but by rule so that they would be accessible to anyone who wants them.

d. Workgroup 8: Judgments (Phil Knox, Chair)

Workgroup 8 met telephonically. Phil Knox called the members' attention to the Simplified and Uncontested Proceedings section of the *RFLP*. Konnie stated that when this workgroup met, they decided that much of what is included in *ARCP* Rules 54 and 55 has already been included in the *RFLP* Section V. Simplified and Uncontested Proceedings. She said that Phil and Annette Burns, Chair of the Simplified and Uncontested Proceedings Workgroup, were going to review this section to give Workgroup 8 a better focus on the rules that still need to be included in the Judgments Section.

Judge Davis asked if Rule 70 and 71 were largely post-decree rules. He wanted to know if they should be in the Judgments section or Post Decree section. Judge Armstrong said it could fit in either place, but he thought it was best to leave it in Judgments because that is where it can be found in the Civil Rules.

Discussion ensued. Phil said that his workgroup would look at it and it can be turned over to the other workgroup if they want to look at it, and the Committee can decide later where it ends up.

6. NEXT MEETING

Friday, August 6, 2004 – 10:00 am – 3:00 pm
Arizona Courts Building
1501 W. Washington Street
Conference Room 119
Conference Call #: 602.542.9006

7. ADJOURNMENT

Judge Armstrong adjourned the meeting at 3:00 p.m.